

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LA DONNA J. COMMONS

Claimant

VS.

CITY OF LAWRENCE

Self-Insured Respondent

Docket No. 1,023,729

ORDER

STATEMENT OF THE CASE

Respondent requested review of the November 2, 2012, Award entered by Administrative Law Judge Brad E. Avery. This claim was placed on the Board's summary calendar for determination without oral argument. Sally G. Kelsey, of Lawrence, Kansas, appeared for claimant. Kip A. Kubin, of Leawood, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found claimant was permanently, totally disabled.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues there was no evidence to support the finding that claimant was permanently, totally disabled. Respondent and claimant have stipulated that claimant has a 5 percent functional disability. Respondent contends the evidence shows claimant has a 50 percent work disability based on a 100 percent wage loss and a 0 percent task loss.

Claimant agrees with respondent that claimant presented no evidence she was permanently and totally disabled. Claimant also agrees there is no evidence in the record as to her percentage of task loss, but she contends she has a 100 percent wage loss. Claimant asks the Board to find she has a work disability.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was injured in a fall at work on February 7, 2005. She continued to work for respondent, with her last day being May 5, 2006. The parties have stipulated claimant was paid temporary total disability benefits in the amount of \$139,044.78. The parties have also stipulated that claimant has a functional impairment of 5 percent to the body as a whole. In their respective briefs to the Board, the parties have also agreed that claimant has a 100 percent wage loss but presented no evidence of a task loss. Claimant has not testified she is permanently, totally disabled, although she stated she did not expect to be working in the future. There has been no testimony from any physician or vocational expert.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2004 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The claimant presented only her testimony in support of her claim for disability. No medical or vocational evidence was presented. There was medical evidence admitted at the preliminary hearings held in 2006 and 2007, but the transcripts were entered into the record at the regular hearing without the medical exhibits.

K.S.A. 44-510c(2) states in part:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.

In this case, no evidence was presented to support that claimant is incapable of engaging in any type of substantial and gainful employment. In her brief, claimant concurred with respondent that there was no evidence of permanent total disability. Based upon the record, the Board finds that there is no basis for a finding that claimant is permanently and totally disabled.

With regard to work disability, claimant testified that she is not employed and experiences a 100 percent wage loss. The testimony of claimant is un rebutted in this regard. Based upon the record, the Board finds that the claimant suffers a 100 percent wage loss.

There is no evidence of task loss in the record. K.S.A. 44–510e(a)states, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident

The essential requirement in proving task loss is the requirement that the task loss be in the opinion of a physician. No physician testified regarding task loss in this case. The Board finds that claimant suffers a zero percent task loss.

Based upon the foregoing, it is the finding of the Board that claimant suffers a 50 percent work disability as the result of her work-related injury. Insofar as claimant has been paid in excess of \$100,000 and all benefits are due and owing, no additional monetary sums are ordered.

The total amount paid by the respondent prior to this order is \$139,044.78 in temporary total disability benefits. The remaining \$39,044.78 is found to be an overpayment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 2, 2012, is modified to reflect claimant has a 50 percent work disability.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Brad E. Avery, Administrative Law Judge